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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NUMBER 909

IN THE MATTER OF:
LOUISIANA LOAN AND THRIFT CORPORATION,
JOHN M. HOLAHAN,
Petitioner,

versus

ALBERT G. REYNOLDS, Trustee
Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

Respondent's Brief in Opposition

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STATEMENT OF THE FACTS

Petitioner's statement of facts is correct and respondent supplements same only to the point of adding specifics. The fee of $20,000.00 was paid to Mr. Holahan on April 24, 1968, the same day he filed the Chapter XI petition and asked that the debtor be retained in possession. (R.

15) Attached to the said petition is a resolution of the Board of Directors of Louisiana Loan & Thrift Corporation dated April 24, 1968, which reads in part as follows:

> "And that Charles Ritchey be authorized and directed to retain John Holahan as legal counsel to represent Louisiana Loan & Thrift with the filing in Federal Court and to pay a fee which shall be approved by the Federal Judge and referee to whom the petition is allotted. Mr. Anzelmo, legal counsel for Louisiana Loan & Thrift, is to assist John Holahan." (R. 42)

ARGUMENT

Respondent will offer argument to the questions for review in the same order as petitioner.

"On lack of opportunity to orally argue:"

Petitioner's argument herein cannot be consistent and sincere with his prior action. Upon the Court of Appeals for the Fifth Circuit rendering a decision adverse to petitioner, he complains of being deprived of his rights and the emasculation of the appeal process because there was no oral argument. Yet on his application for a review of the referee's decision herein to the district court, he entered into a stipulation that the cause be submitted on the record *without oral argument.* (R. 130) Upon this stipulation the district court ordered the matter submitted without oral argument. (R. 131)

The United States Court of Appeals for the Fifth Circuit previously has had occasion to consider this same issue of oral argument on appeal in Murphy v. Houma Well Service, 5th Cir., 1969, 409 Fed. 2d 804. In the

yet unreported opinion rendered on October 7, 1969 by Chief Judge John R. Browne of the Fifth Circuit in James Leo Huth vs. Southern Pacific Company, he devoted a portion of same to outline and update that court's practices and procedures in screening classification of cases, including disposition on the summary callendar without oral argument. He states:

"In this process of discriminating selectivity, the Court, in its continuing self-education from cumulative experience in the shaping of this new judicial tool, strives to meet both the literal demands and, more important, the underlying spirit of F.C.C. v. WJR, The Goodwill Station, Inc., 1949, 337 U.S. 265, 274-77, ... S. Ct. ....., ... 93 L. Ed. 1353, 1360-61.

There the Court, rejecting the Court of Appeals' holding that oral argument is required to satisfy the Constitution, said, "Taken at its literal and explicit import, the Court's broad constitutional ruling cannot be sustained." Any such conclusion, the Court went on, "would require oral argument upon every question of law * * * regardless of whether the legal question were sustantial or insubstantial; of the substantive nature of the asserted right or interest involved; of whether Congress had provided a procedure, relating to the particular interest, requiring oral argument or allowing it to be dispensed with * * *." And then declining to explore the administrative consequences of any such holding, the Court declared, "It is enough to say that due process of law, as conceived by the Fifth Amendment, has never been cast in so rigid and all-inclusive confinement."

The Court then proceeded to emphasize the discriminating nature of the problem. "On the contrary, due

process of law has never been a term of fixed and invariable content. This is as true with reference to oral argument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing, Londoner v. Denver, 210 U.S. 373, 52 L. Ed. 1103, 28 S. Ct. 708, in others that argument submitted in writing is sufficient. Morgan v. United States, 298 U. S. 468, 481, 80 L. Ed. 1288, 1295, 56 S. Ct. 906. See also Johnson & Wimsatt v. Hazen, 69 App. D.C. 151, 99 F.2d 384; Mitchell v. Reichelderfer, 61 App. D.C. 50, 57 F.2d 416."

The appeal court herein, after judicially screening this case, correctly determined that it possessed no substantial question of procedural or substantive federal law and that the argument submitted in writing was sufficient.

ON THE MERITS

On August 7, 1968 the Referee in Bankruptcy rendered his order fixing the compensation of Mr. Holahan at $3,000.00. (R. 120) Thereafter, a review was taken to the District Court by Mr. Holahan, and in accordance with General Order 47 in Bankruptcy of the Supreme Court of the United States, the District Court affirmed the order of the Referee. General Order 47 provides:

> "Unless otherwise directed in the order of reference, the report of the referee or special master shall set forth his finding of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

The Honorable Edward J. Boyle, Sr., in affirming the Referee's ruling, stated:

> "After considering said record, certificate and memorandum, the Court is of the opinion that the Referee's finding of fact and conclusions of law are not clearly erroneous. On the contrary, they are amply supported by the record, the evidence, and the applicable law and are accepted by the Court." (R. 132)

No one denies Mr. Holahan's right to reasonable compensation for services rendered in these proceedings, but the manner and means in which he chose to compensate himself is contested.

Mr. Holahan in amending the schedules on June 10, 1968, (R. 116-117) after the appointment of a receiver, to disclose for the record his fee payment set forth that it included services as attorney for the debtor in possession. It should be noted that the debtor corporation and the debtor in possession are two distinct categories and are not synonymous. The court alone has the final determination of any action taken by a debtor in possession. Hence, the board of directors by prior action could not bind the court. A reading of the resolution attached to the petition clearly shows that such was not the intent of this board. Its desire was to provide for compensation for its attorney, but only subject to the approval of the court.

The examination of the propriety and reasonableness of Mr. Holahan's fee was brought by the receiver under Section 60(d) of the Bankruptcy Act.

Section 60(d) is applicable to Chapter XI arrangement proceedings.

> "Section 60(d) of the act is applicable for re-examination of prepayments to attorneys in conjunction with arrangement and corporate reorganization proceedings as well as ordinary bankruptcies."
>
> *Re: Shapera 869 2d 506, 32 ABR 508 (1936 CA Ill.), Remington Vol. 6, Sec. 2703, p. 254.*

Careful consideration should be given to the distinction between Sections 60(d) and 64(a) of the Bankruptcy Act. These sections read as follows:

> *Section 60(d) 11 U.S.C.A. 96(d):*
>
> d. If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney at law, for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the trustee or any creditor and shall be held valid only to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.
>
> If, whether before or after filing, a debtor shall agree orally or in writing to pay money or transfer property to an attorney at law after the filing; the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the bankrupt made prior to discharge and shall be held valid only to the extent of a reasonable amount to be determined by the court, and any excess obliga-

tion shall be canceled, or if excess payment or transfer has been made, returned to the bankrupt."

Section 64(a) 11 U.S.C.A. 104:

"Debts Which Have Priority. (a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be . . . and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the bankrupt in voluntary and involuntary cases, and to the petitioning creditors in involuntary cases . . ."

Collier on Bankruptcy clearly covers the distinction between the two sections and sets forth a list of citations to support the position that only services rendered by an attorney prior to the filing of the petition in bankruptcy should be considered in determining the reasonableness of the fee paid.

Collier, Vol. 3, p. 1143:

"It is important, however, in any treatment of Section 60d to distinguish it from Section 64a(1). The latter section covers only those services rendered in aid of the administration of the estate and the carrying out of the provisions of the Act, whereas the scope of Section 60d is broader, not being so limited to a particular class of legal services. An additional distinction between the two provisions is that Section 60d covers only payments or transfers actually made for services rendered prior to the commencement of bankruptcy proceedings; compensation for services rendered but not paid for prior to bank-

ruptcy, and compensation for services rendered after that time can not be allowed in proceedings under Section 60d, but must be sought either under Section 64a(1), or as a general claim." Matter of Klein-Moffett Co. ,(D.C., Md.) 12 Am. B.R. (NS) 422, 27 F. (2d) 444; Matter of Falk (C.C.A., 2d Cir.), 13 Am. BR (N.S.) 515, 30 F. (2d) 607; Quinn v. Union Nat. Bank (C.C.A., 8th Cir.), 13 Am. B.R. (N.S.) 628, 32 F. (2d) 762, Matter of Buchanan (C.C.A., 2d Cir.), 23 AM. B.R. (N.S.) 564, 66 F. (2d) 416, cert. den. 290 U.S. 682, 54 S. Ct. 120, 78 L. Ed. 588; Slattery v. Dillon (C.C.A., 9th Cir.), 9 Am. B.R. (N.S.) 298, 17 F. (d) 347; Pratt v. Bothe (C.C.A., 6th Cir.), 12 Am. B. R. 529, 130 Fed. 670; Matter of Rolnick (C.C.A., 2d Cir.), 2 Am. B. R. (N.S.). 175, 294 Fed. 817; See In re Autocue Sales & Distributing Corp. (S.D.N.Y., 1958) 167 F. Supp. 672.

In the case of *Haar v. Oselnad (In re: Knickerbocker Leather vs. Novelty Co. Inc.) 265 F. 2nd 218 (C.C.A. 2 1959)*, the court held:

> "Where attorney, pursuant to agreed retainer of $2,500.00, filed petition for arrangement and received $1,000.00 and assignment of accounts receivable which yielded $1,500.00, and contemplated arrangement failed and bankruptcy ensued attorney was properly allowed $500.00 for his pre bankruptcy services and bankruptcy trustee was properly allowed to recover the balance for the benefit of the estate."

In this case the pre bankruptcy date referred to was the date on which the arrangement proceeding was filed. The court also did not preclude an application

for an allowance as an expense of the administration of the estate.

In the publication of the Proceedings of Fifth Seminar for Referees (1968) p. 55 et. seq. there is a discussion of fees in a Chapter XI proceeding and the compensation of attorneys for debtor corporations. An attorney for the debtor corporation is allowed compensation even though a plan may not be approved in a Chapter X. However, this varies from Chapter XI which precludes compensation where no arrangement is confirmed, unless the court can find that such services were beneficial to the estate.

In the case now before the court the debtor corporation has made the judicial admission that a plan of arrangement could not be effected and asked that the proceedings be shifted to Chapter X. From the reasoning set forth in the before mentioned Referee's Seminar, it would follow that it is up to the court to determine if Mr. Holahan's services were beneficial to the estate and if he should be compensated.

In place and stead, Mr. Holahan has chosen to fix and pay his own compensation without regard of the court, the debtor corporation or the creditors of this estate. To allow such a practice would create a dangerous precedent.

To support his position he relies on the Supreme Court case of *Conrad, Rubin and Lesser v. Pender 289 U.S. 472, 53 S. Ct. 703 (1933)* and also a paper given by Referee Kelleher and included in the Proceedings of the Third Seminar for Referees in Bankruptcy (1966).

We offer no argument to the *Conrad case* and the basic law which it contains. However, it should be pointed out that this case was decided in 1933 and as petitioner himself points out in his brief, Chapter XI first came into the Bankruptcy Act in 1938. In that year the Chandler Act was passed which effected great changes in the bankruptcy law and every bankruptcy practioner knows that you must be very careful in the consideration of cases prior to 1938.

The law set forth in the Conrad case is sound as far as it goes. Petitioner is now trying to read something into the case which is not there. This case did not deal with a situation which was anyway similar to the instant case.

In this case, Mr. Holahan knew that a debtor in possession was contemplated and he was well aware of the assets of the corporation. The conrad case distinguishes between Section 60(d) and 64b (now Section 64a) of the Bankruptcy Act, but it does not hold that Section 60(d) is another method of paying an attorney for his services. Instead of a method of payment it was and is intended as a safeguard against the payment of unreasonable fees.

It is common practice in "No Asset" cases for the attorney representing the bankrupt to ask for his fee in advance. In preparing the bankrupt's schedules he discloses the fee and if the court itself or any creditor believes it unreasonable they can under Section 60(d) examine same. Section 60(d) does not authorize or even suggest payments in advance. It is a sub-paragraph of Section 60 which generally deals with preferential payments and the recovery of same.

Any attempt to equate small bankruptcy cases or "No Asset" cases with the present case is absurd. The Conrad case in recognizing the right of a bankrupt to have the aid and advice of counsel and pay him a reasonable compensation for his services envisioned a situation where the bankrupt was without assets or in a nominal amount.

Every case must be decided on its own set of facts. A reading of that portion of Referee's Kelleher's papers as quoted by petitioner in his brief to this court is in accord with the Trustee's position regarding Section 60(d) and 64a(1). It also is not in conflict with the Referee Flanagan's position. Referee Kelleher says:

> "The attorney's right of retention should not be defeated solely by the fact that some of the needed services were performed *shortly after* the filing date." (Emphasis supplied)

Referee Kelleher contemplated a straight bankruptcy and attendance of counsel at the first meeting of creditors after the petition was filed. He did not contemplate a Chapter X or Chapter XI proceeding. If he had the present case before him with a corporate resolution for the court to approve the compensation of the debtor's attorney, and the immediate appointment of a debtor in possession, Referee Kelleher would have restricted the hearing to only those services rendered up to the date of filing.

The Referee's ruling in this matter is not invariance with the established law in this district or any other. It certainly does not hold that an attorney cannot receive in advance a reasonable fee for his services in a straight bankruptcy with nominal or no assets. Nor does it hold that in substantial matters that an attorney cannot be

compensated in advance for preliminary work in a proceeding according to his experience, ability and the complexity of the case. However, it will not allow a court appointed attorney for a debtor in possession to fix his own fee without the knowledge or approval of the court. It is the obligation and duty of the court to examine and supervise the administration of those cases referred to it.

In the matter of *Imperial "400" National, Inc. et al 274 F. Supp. 351 (1967)*, the court said:

> "The reasonableness of a fee received is a matter for the court to determine and the determination of whether or not the fee was unreasonable in amount should be made as soon as practicable after the filing of the petition."

and further stated:

> "Transfer of assets of a debtor, prior to filing arrangement proceeding not made in regular course of business, and not readily discoverable from the corporate records, is not to be encouraged by awarding fees to attorneys to whom such transfers have been made."

The Imperial National case involved an examination by a Chapter X trustee of excessive attorney fees paid to the debtor's attorney in connection with a Chapter XI proceeding which aborted. The court ordered that sums paid to attorneys for services in connection with arrangement petition before the petition was filed be refunded to the trustee and held that application for allowance for services rendered before and after the filing of the petition may be made after the plan of reorganization is approved or the proceedings otherwise terminated.

Mr. Hoahan invites the court's attention to the *Louisiana Investment and Loan Corporation* case No. 63-801 In Bankruptcy, United States District Court for the Eastern District of Louisiana, New Orleans Division (unreported), which is still an open case under reference to Referee E. E. Talbot, as a precedent herein. The only testimony concerning this case given in this hearing before the Referee was by Mr. Holahan and that to the effect that the attorney for the debtor corporation received a fee of twelve-odd thousand dollars. (R. 65) Later in the testimony Edward Heller testified that the attorneys for the trustee considered filing a rule to test the reasonableness of the fee but it was never filed. (R. 93) The only reason for now mentioning it to the court is to have the record show that the amount in question in the Louisiana Investment and Loan Corporation case was some twelve thousand-odd dollars as Mr. Holahan testified and not the sum of twenty-five thousand dollars he states in his brief at page 12. Other statements of Mr. Holahan in this regard are matters of conjecture and are not supported by the record herein or the record of Louisiana Investment and Loan Corporation. The factual situation in this case is entirely different from the Louisiana Investment and Loan Corporation case, none of which has been presented in this proceeding. Appellant in his brief at page 12 correctly stated that Edward M. Heller and Thomas Hartley Kingsmill were the attorneys for the trustee in the Louisiana Investment and Loan Corporation case. The latter is one of the counsel for the trustee herein and entirely familiar with the facts, circumstances and considerations in both cases.

There has been no error by the referee in his findings of fact or conclusions of law. In the instant case the

referee properly applied the provisions of Section 60(d) to the factual situation and determined that Mr. Holahan was without right to fix and pay himself a fee of $20,000.00 without application and approval of the court. The Referee considered all factors in this matter and determined that reasonable compensation was $3,000.00 and ordered the remaining $17,000.00 to be paid forthwith to the receiver. The District Court concurred and affirmed the Referee. In turn the United States Court of Appeals for the Fifth Circuit affirmed the District Court. It is respectfully submitted that there is no substantial question of procedural or substantive federal law presented to warrant the granting of writs of certiorari herein.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the above and foregoing brief has been served this day upon counsel for the petitioner, John M. Holahan, by mailing a copy of same to Blake G. Arata, of the law firm of Doyle, Smith, Doyle, Gordon, Arata & Watters, Suite 2303, 225 Baronne Street, New Orleans, Louisiana 70112.

New Orleans, Louisiana, this ..... day of December, 1969.

HERBERT W. CHRISTENBERRY, JR.